

FILED

JAN 06 2009

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

PATRICK E. DUFFY, CLERK

By DEPUTY CLERK, MISSOULA

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|-----------------------------|---|---------------------|
| BOBBY A. ERVIN, and T.E., a |) | CV 08-122-M-DWM-JCL |
| minor child, |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| vs. |) | ORDER |
| |) | |
| LISA MICHELLE ESTOPARE, |) | |
| |) | |
| Defendant. |) | |
| |) | |

Plaintiff Ervin and Defendant Estopare are the parents of minor children T.E. and B.E. As a part of their divorce proceedings, Ervin was awarded custody of T.E., while Estopare received custody of B.E. Each parent has visitation rights with the non-custodial children. Ervin brings this action on his own behalf and on behalf of T.E. alleging tortious conduct by Estopare in interfering with their visitation rights with B.E. Estopare has filed a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6) and lack of jurisdiction under Rule 12(b)(1). Estopare also seeks dismissal under Fed. R. Civ. P. 11 as a penalty for filing this allegedly frivolous action.

United States Magistrate Judge Jeremiah C. Lynch entered Findings and Recommendations in which he concludes that the motion to dismiss should be denied. Judge Lynch determined that this Court has diversity jurisdiction over these parties because

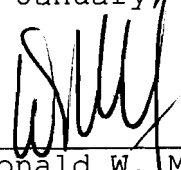
the domestic relations exception does not apply. The Plaintiffs have stated a claim, Judge Lynch concludes, because the Verified Complaint states a case for, at a minimum, intentional infliction of emotional distress. Because he finds that the Rule 12 motions should be denied, Judge Lynch recommends denial of the Rule 11 motion to dismiss as well.

Defendant Estopare did not timely object and so has waived the right to de novo review of the record. 28 U.S.C. § 636(b)(1). This Court will review the Findings and Recommendation for clear error. McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc., 656 F.2d 1309, 1313 (9th Cir. 1981). Clear error exists if the Court is left with a "definite and firm conviction that a mistake has been committed." United States v. Syrax, 235 F.3d 422, 427 (9th Cir. 2000).

I can find no clear error with Judge Lynch's Findings and Recommendations (Doc. No. 26) and therefore adopt them in full.

Accordingly, IT IS HEREBY ORDERED that Defendant Estopare's motion to dismiss (Doc. No. 7) is DENIED, and the request for sanctions under Rule 11 is DENIED.

DATED this 6th day of January, 2009.



Donald W. Molloy, District Judge
United States District Court